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IN THE

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COURT OF CRIMINAL APPEALS

OF TEXAS
AUSTIN, TEXAS

MICHAEL JOSEPH BIEN
APPELLANT,

VS.

THE STATE OF TEXAS,
APPELLEE

APPELLANT'S REPLY BRIEF

NO. 11-14-00057-CR
NO. 11-14-00058-CR
COURT OF APPEALS FOR THE
ELEVENTH DISTRICT OF TEXAS AT EASTLAND

On appeal from Cause Numbers CR22319 & CR22320
in the 35th District Court of Brown County, Texas
Honorable Stephen Ellis, Presiding

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In its Brief on the Merits, the State argues first that the Court of Appeals erred when it determined that Criminal Solicitation and Criminal Attempt were the same offense, and second, that the Court of Appeals correctly determined the "most serious offense" in this case was Criminal Solicitation. This Court should reject the State's arguments.

Reply to State's First Issue

Appellant asserts that the Court of Appeals correctly determined that Appellant suffered a double jeopardy violation. Said Court used the correct analysis, beginning with *Blockburger* and the requisite elements test. The Court set forth the elements of the offenses and determined they were similar but not identical. Slip op. at 4-5. The State does not seriously contest this holding. After noting that *Blockurger* "is a rule of statutory construction and is not the exclusive test to determine whether the two offenses are the same[,] *Bigon* [*v. State*], 252 S.W.3d [360] at 370[(Tex.Crim.App. 2008),]" the Court moved on to analyze the offenses under *Ervin v. State*, 991 S.W.2d 804 (Tex.Crim.App. 1999).

In *Ervin, supra*, this Court set forth a list of non-exclusive factors to consider when analyzing a multiple-punishment claim. The Court of Appeals correctly analyzed the two offenses using each of these factors, Slip op. at 5-7, and agreed with Appellant's argument that he had suffered a double jeopardy violation.

The State's primary complaint seems to be that the appellate court did not use the "eighth grade grammar rule" when determining the gravamen of the offenses, citing *Jones v. State*, 323 S.W.3d 885, 891-891 (TexCrim.App. 2013), which in turn cited an opinion by former Judge Cochran. But the "eighth grade grammar rule" is referred to only as "[a]nother aid in determining the focus or gravamen of an offense[,]" and is not a requirement. *Id*. at 891. However, a review of the appellate court's opinion reflects that, although it did not used the word "grammar," that Court did indeed consider grammar when it referred to language in the statute. Slip op. at 6.

The Court of Appeals correctly determined that the gravamen of the two offenses were the same because each has a similar focus. In addition, both have the same type of focus. Moreover, they are conduct-oriented offenses which punish Appellant for the same act, namely the employment of a hit man to kill the victim. Because the focus of each offense tends to indicate a single instance of conduct, the Court held this factor weighs heavily in favor of treating the offenses the same for double jeopardy purposes. Slip op. at 7.

The State quibbles with this analysis, saying that the grammar of the two statutes indicates that only the solicitation is a nature of conduct offense while attempt is a result of conduct offense. The Court of Appeals correctly analyzed this

factor, as stated above, and determined that both are nature of conduct-oriented offenses. "The focus for solicitation to to commit capital murder is to 'request, command, or attempt to induce' Stephen Reynolds to kill Koh Box for remuneration." Slip op. at 7. The focus of attempted capital murder is "to do an act – employment of Stephen Reynolds by remuneration – which amounted to more than mere preparation in an attempt to kill Koh Box." *Id*. Specifically, "the offense of attempted capital murder requires proof that Appellant solicited Stephen Reynolds to kill Koh Box." Clearly, then, the gravamen of the offense is the payment of money for killing the victim, which is the nature of conduct, not the result of conduct. In fact, neither offense has a result – they are both inchoate crimes which by their very nature are preparatory offenses and involve only the conduct of the perpetrator in attempting to carry out some crime. The result of the conduct – here, capital murder – is precluded by some circumstance, such as being caught, as was Appellant in this case. This Court should reject the State's argument here.

The State also argues that the two statutes do not have identical punishment ranges. As the Court of Appeals correctly noted, the offenses are both first-degree felonies, and both have a punishment range of five to ninety-nine years or life and a possible fine of up to $10,000. Slip op. at 6.

Reply to State's Second Issue

In its brief, and again in its *Reply*, the State insists that the only available remedy under the circumstances of this case is the vacation of the least serious offense. The State argues that the remedy is dictated to this Court by *Ball v. United States*, 470 U.S. 856 (1985). After the Supreme Court of the United States concluded that any secondary conviction, "even if it results in no greater sentence, is an impermissible punishment," the Court stated:

> We emphasize that while the Government may seek a multiple-count indictment against a felon for violations of §§ 922(h) and 1202(a) involving the same weapon where a single act establishes the receipt and possession, the accused may not suffer two convictions or sentences on that indictment. If, upon the trial, the district judge is satisfied that there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense. Should the jury return guilty verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses.

Ball v. United States, *supra* at 863-864. It should be clear that the Court was addressing trial courts to preclude double jeopardy violations by foregoing secondary judgments. In Texas, a criminal judgment is "the written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant." Tex. Code Crim. Pro. art. 42.01 §1. This authority has nothing to do with the two issues before this Court and in no way precludes a rule of appellate review to reverse multiple convictions for the same offense when the most serious

offense cannot be determined.

Appellant expressly advanced his arguments under the United States Constitution, but also under Article I §14 of the Texas Constitution. This provision has been construed independently from federal interpretation of the Fifth and Fourteenth Amendments to the United States Constitution. Thus, even if *Ball* is misconstrued to impose a specified remedy on the states, this Court is free to provide remedies which are greater than the federal constitution requires. *Heitman v. State*, 815 S.W.3d 861 (Tex.Crim.App. 1991).

The State argues apocalyptic consequences should Appellant's proposed remedy be adopted. Its argument essentially assails acquittal itself as an appellate remedy. Appellant's remedy does more than provide relief for Appellant. It advances the interests of judicial economy and the preclusion of post-conviction litigation.

State prosecuting attorneys are (but should not be) forgiven for failing to appreciate when one of its accusations is the same, for double jeopardy purposes, as its other accusations. State trial courts are forgiven (but should not be) for multiple judgments for the same offense. But this Court must lend the appellate courts guidance when its forgiveability of trial court decisions clashes with the central mission of appellate courts for resolution of close questions.

Appellate courts must have a rule that discourages the issue from reaching

them, even if it means that inattentiveness to double jeopardy concerns can no longer be tolerated. If the parties and trial courts know the stakes, this rather narrow double jeopardy issue will arise only from time to time, when the most negligent prosecutors and judges ignore this important constitutional right.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays this Court reject the State's arguments, reverse the appellate court's judgment and remand the case to the trial court for dismissal of the indictments.

Respectfully submitted,

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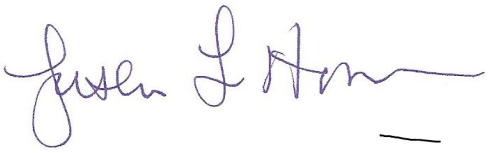

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CERTIFICATE OF COMPLIANCE: By affixing my signature above I hereby certify that this document contains a word count of 1497 and therefore complies with Tex.R.App.Proc. 9.4(i)(3).

CERTIFICATE OF SERVICE: By affixing my signature above, I hereby certify that a true and correct copy of the foregoing *Appellant's Reply Brief*, was delivered electronically (via Efile and Serve) to Elisha Bird, Brown County Assistant District Attorney, at the following email address, elisha.bird@browncountytx.org, on December 7, 2016.